KETUA PENGARAH HASIL DALAM NEGERI MALAYSIA
v. EHSAN ARMADA SDN BHD

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
AZIMAH OMAR JCA
AZHAHARI KAMAL RAMLI JCA
[CIVIL APPEAL NO: W-01(A)-190-04-2022]
28 NOVEMBER 2023

Abstract – *It has long been a property development practice and policy that the State Authority would impose mandatory conditions for the development of low-cost housing on developers who are desirous to undertake any property development ('low-cost policy'). The developer, in this case, is not exempted from this low-cost policy. The payment of an exemption sum made by the developer to Lembaga Perumahan dan Hartanah Selangor to exempt itself from building low-cost housing in the project is not deductible under s. 33(1) of the Income Tax Act 1967, as it is found that the exemption sum is clearly a capital outlay interjected to set the developer's business in a more advantageous position beyond the ordinary terms and course of a mixed development with low-cost policy in place.*

REVENUE LAW: *Income tax – Deduction – Exemption sum – Exemption sum paid to exempt developer from State's policy and requirement to build low-cost apartments – Whether deduction claimed wrongful – Whether payment of exemption sum deductible under s. 33(1) of Income Tax Act 1967 ('ITA') – Whether Director General of Inland Revenue ('DGIR') time barred under s. 91(3) of ITA to issue notices of assessments – Whether DGIR correctly imposed penalty under s. 113(2) of ITA*

This appeal emanated from the decision of the Special Commissioners of Income Tax ('SCIT decision') wherein the SCIT had decided in favour of the appellant, Director General of Inland Revenue ('DGIR') and had dismissed the appeal lodged by the taxpayer ('respondent'). The DGIR had conducted a field audit on the income tax returns assessments for the years 2007, 2008, 2009 and 2010 ('YOAs') of the respondent. Upon the field audit, the DGIR discovered that throughout the YOAs, the respondent had claimed a deduction on a payment of the total sum of RM6,226,981 ('exemption sum') paid to the Lembaga Perumahan dan Hartanah Selangor ('LPHS') to exempt the respondent from the State's policy and requirement to build low-cost apartments in its Mutiara Indah Housing Project ('project') under s. 33(1) of the Income Tax Act 1967 ('ITA') in order to provide the State's constituents

A with affordable housing. The State Authority is empowered under s. 3 of the Town and Country Planning Act 1976 to implement policies in respect of development of lands under any given State Authority's jurisdiction. It has long been a property development practice and policy that the State Authority would impose mandatory conditions for the development of
B low-cost housing on developers who are desirous to undertake any property development ('low-cost policy'). The respondent, being the developer of the project, was not exempted from this same low-cost policy. Majlis Mesyuarat Kerajaan Negeri ('MMKN') had agreed to approve the alienation of the project land ('tanah anugerah') to the respondent for the purposes of a mixed
C development with the strict condition that the mixed development must fulfil the purpose of relocating and housing squatters by constructing low-cost housing, medium low-cost housing and medium-cost housing within the same tanah anugerah and the project. The respondent, however, had apportioned a specific area within the 84 acres of the tanah anugerah, which
D was situated on a Class 3 slope area, for low-cost housing, which was not suitable for the construction of low-cost housing as any development on a Class 3 slope area would incur more expenses and further hurt the profit margin. Notwithstanding that the predicament of the respondent was self-induced, the respondent still submitted the development plan while apportioning the Class 3 slope area to be the designated area for low-cost
E housing. The respondent then applied for an exemption to exempt itself from having to abide by the low-cost policy citing the supposed economic non-feasibility of building low-cost housing on a Class 3 slope area. Upon paying the exemption sum, the respondent thereafter enjoyed the benefit of the exemption, the benefit to construct free market housing, and the benefit
F of higher profit margins of free market housing as compared to the margins of low-cost housing. Having taken the position that the deduction claimed by the respondent was wrongful, the DGIR issued the notice of additional assessment, notices of assessment and notification of non-chargeability against the appellant for the respective YOAs. The DGIR found that the
G respondent had wrongfully claimed the exemption sum as a deductible under s. 33(1) of the ITA. The respondent filed appeals to the SCIT against DGIR's notices. The SCIT found that the exemption sum ought not to be considered a deductible under s. 33(1) of the ITA, as, *inter alia*, the respondent was the progenitor of the project's own non-feasibility to develop low-cost housing
H as it was by the respondent's own volition and planning to apportion the Class 3 slope areas of the 84 acres of tanah anugerah for the construction of the low-cost housing. The respondent appealed to the High Court against the entire decision of the SCIT. It was the respondent's case that the SCIT was wrong in holding that the payment/contribution made by the respondent to LPHS to exempt itself from building low-cost housing in the project
I (exemption sum) was not deductible under s. 33(1) of the ITA. The High

Court allowed the respondent's appeal on the primary ground that the exemption was a bare necessity to remove an 'obstacle' that would have otherwise obstructed the respondent from conducting its business. Hence, this appeal. The issues that arose herein were (i) whether the payment of the exemption sum made by the respondent to the LPHS to exempt itself from building low-cost housing in the project was deductible under s. 33(1) of the ITA ('first issue'); (ii) whether the DGIR was time barred under s. 91(3) of the ITA to issue out the notice of additional assessment for the year 2007, notices of assessment for YOA 2008 and 2010, and notification of non-chargeability for YOA 2009 ('second issue'); and (iii) whether the appellant-DGIR had correctly and reasonably imposed a penalty under s. 113(2) of the ITA at the rate of 45% on the assessments and additional assessments for YOAs 2007, 2008 and 2010 ('third issue').

Held (allowing appeal)
Per Azimah Omar JCA delivering the judgment of the court:

(1) An ordinary development and developer being placed with the low-cost policy would have to ordinarily abide by the same policy, and ordinarily expect a lower profit margin (as the very nature of low-cost housing was for affordability and not maximum profit). To expend money to be exempted from this ordinary course of business was no longer mere business expense, but a capital outlay to set the business. The exemption sought was a one-off capital payment or injection to pivot the respondent's business to be more advantageous well beyond the ordinary nature and expectation of a mixed development with low-cost housing elements. (paras 29 & 30)

(2) In the ordinary course of a mixed development with low-cost policy in place, an ordinary expense would refer to expenses to realise the State's mission to aid and help its constituents to be able to afford housing. Any one-off payment that would exempt the respondent from this social responsibility element, was certainly not an ordinary expense and was instead a capital outlay. The respondent had paid the exemption sum to attain an enduring advantage to be wholly and fully exempted from the low-cost policy. Thus, the disbursement paid by the respondent (the exemption sum) could not be considered an ordinary recurring business expense. It was a one-time payment to attain an advantage which pivoted the business to be more lucrative (and not merely to enable business or trade). The one-off exemption would effectively carry an overwhelming enduring benefit in the form of a continuous extraordinary advantage for the business to be insulated and exempted from the ordinary social responsibility policies put in place typical to a mixed development with low-cost housing elements. (paras 33-41)

(3) When the exemption sum was paid, the respondent was free to construct and sell free market housing which were vastly more lucrative than low-cost housing. It was a total shift of concept, profit margin and total elimination of all low-cost housing and social responsibility elements from the project. The respondent could still continue with construction and sale of the mixed development by apportioning a different land area within the 84 acres of tanah anugerah for affordable housing. Thus, the exemption was not a necessary expense to earn income. Construction and sale could still proceed without the exemption *albeit* for lower margins (due to the construction of affordable housing). And this lower margin would be the common and ordinary margin for any developer who must abide by the policy for affordable housing. (paras 54-56)

(4) Anything that was injected to insulate the respondent from the affordable housing margin was not ordinary expense and instead a one-off capital injection to maximise profits at the detriment and expense of the low-cost policy in place. It was not a commonly recurring expense that the respondent had to incur in the course of constructing and completing the mixed development project with low-cost housing element. Thus, the exemption sum was clearly a capital outlay injected to set the respondent's business in a more advantageous position beyond the ordinary terms and course of a mixed development with low-cost policy in place. The first issue was answered in the negative (paras 57 & 58)

(5) The respondent had negligently deducted the exemption sum from its taxable income. Therefore, by the respondent's own argument, the negligence complained of would have already matched the DGIR's assessments, and additional assessment over the wrongly deducted exemption sum. By the respondent's own argument, then the exception under s. 91(3) of the ITA would necessarily apply. Thus, the DGIR was not time barred to issue its notices of assessments, additional assessments and non-chargeability regarding the wrongly deducted exemption sum. This court answered the second issue in the negative. (paras 63 & 65)

(6) Under s. 113(2) of the ITA, the DGIR exercised good grace and discretion and only imposed a penalty of 45% of the undercharged or undeclared income. The respondent's defence of good faith was not open to a penalty imposed under s. 113(2) of the ITA. If the same defence of good faith was intended by Parliament to apply to s. 113(2) of the ITA, then Parliament would not have drafted two separate provisions to differentiate the circumstances in s. 113(1) and s. 113(2) of the ITA. The defence of good faith was a clear feature in s. 113(1) of the ITA (in instances where there was a criminal prosecution for omitting or understating income). The respondent already had the benefit of not

having any criminal prosecution mounted against it. The appellant had exercised due discretion and opted only to seek a smaller sum of penalty (without pursuing any criminal prosecution) under s. 113(2) of the ITA. In any event, based on the conduct of the respondent, it was difficult to find good faith on its part. Accordingly, the third issue was answered in the positive. (paras 66-75)

Case(s) referred to:

British Insulated And Helsby Cables, Limited Appellants v. Atherton Respondent [1926] AC 205 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri Malaysia v. Mitraland Kota Damansara Sdn Bhd [2023] 6 CLJ 701 CA ***(dist)***

Robert Addie And Sons' Collieries, Limited v. The Commissioners Of Inland Revenue 8 TC 671 ***(refd)***

Robinson (Inspector Of Taxes) v. Scott Bader Co Ltd [1981] 2 All ER 1116 ***(refd)***

Strong And Company Of Romsey, Limited v. Woodifield (Surveyor Of Taxes) [1906] 5 TC 215 ***(refd)***

Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 10 CLJ 114 CA ***(refd)***

T Sivam Tharamalingam v. Public Bank Bhd [2018] 6 CLJ 1 FC ***(refd)***

Tucker (Inspector Of Taxes) Respondent Granada Motorway Services Ltd Appellants [1979] 1 WLR 683 ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 33(1), 91(1), (3), 113(1), (2), Schedule 5, para 34
Town and Country Planning Act 1976, s. 3

For the appellant - Ashrina Ramzan Ali, Surani Che Ismail & Athari Faris Ammerry Hussein; Revenue Counsel

For the respondent - Vijey R Mohana Krishnan & William Wong; M/s Raja, Darryl & Loh

[Editor's note: For the High Court judgment, please see Ehsan Armada Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2022] 10 CLJ 400 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azimah Omar JCA:

Introduction

[1] This appeal concerns an income tax matter. Dissatisfied with the decision of the learned High Court Judge in Kuala Lumpur High Court given on 3 March 2022, the Director General of Inland Revenue (Ketua Pengarah Hasil Dalam Negeri Malaysia – "the DGIR") had filed a notice of appeal in the Court of Appeal appealing against the said decision.

[2] The appeal before us emanated from the decision of the Special Commissioners of Income Tax ("the SCIT decision") wherein the SCIT had decided in favour of the DGIR and had dismissed the appeal lodged by the respondent (Ehsan Armada Sdn Bhd – "the taxpayer").

[3] The respondent, by way of case stated pursuant to para. 34 of Schedule 5 of the Income Tax Act 1967 ("ITA 1967"), had appealed to the High Court against the entire decision of the SCIT dated 30 August 2019. Principally, it is the respondent's case that the SCIT was wrong in holding that the payment/contribution made by the respondent (as a developer) to the Lembaga Perumahan dan Hartanah Selangor ("LPHS") to exempt itself from building low-cost housing in the project (the exemption sum) is not deductible under s. 33(1) of the ITA. According to the respondent, the capital outlay paid (at the front-end of the business before any development ever took place) in the form of an exemption sum paid to the LPHS to exempt the developer from having to construct low-cost housing as a supposed 'expenses' is purely, wholly and exclusively for the purpose of generating income (under s. 33(1) of the ITA 1967).

[4] It needs to be highlighted that the appreciation of the difference (discernment and differentiation) between a deductible business expense (to generate income) and capital payment under this oft-litigated provision is truly a difficult and complex exercise to be undertaken by the authorities and by the courts. This is simply because no business-for-profit would expend monies without the view of facilitating business for generating income and profit. But it must be made clear that not all expenses, although in the end, such expense would indirectly facilitate the business, can be classified as 'expenses' in the ordinary course of the core business activity (which in this case would be the expenses ordinarily expected in the course of a mixed development with low-cost housing elements).

Background Facts

[5] We will begin with the conduct of a field audit by the Director General of Inland Revenue ("DGIR/appellant") on the income tax returns assessments for the years 2007, 2008, 2009, and 2010 ("YOAs") of Ehsan Armada Sdn Bhd ("the respondent"). Upon the field audit, the DGIR discovered that throughout the YOAs, the respondent had claimed a deduction on a payment of the total sum of RM6,226,981 ("exemption sum") paid to the LPHS to exempt the respondent from the State's policy and requirement to build low-cost apartments in its Mutiara Indah Housing Project ("the project") under s. 33(1) of the ITA 1967 in order to provide the State's constituents with affordable housing. Having taken the position that the deduction claimed by the respondent is wrongful, the DGIR issued the notice of additional assessment, notices of assessment, and notification of non-chargeability against the respondent for the respective YOAs.

[6] We have perused the learned High Court Judge's grounds of judgment ("learned judge") and find that the learned judge unfortunately failed to appreciate certain core facts and context underlying the case. One such core context was one of the objectives that the State Authority intended to achieve when alienating the project land ("tanah anugerah") to the respondent in the first place.

[7] The State Authority is empowered under s. 3 of the Town and Country Planning Act 1976 to implement policies in respect of the development of lands under any given State Authority's jurisdiction. It is common knowledge that in recent years, our nation has seen a surge of soaring property prices which consequently led to housing becoming gradually unaffordable especially for the lower-income sector of Malaysian society. Thus, in an effort to mitigate the hardship caused, it has long been a property development practice and policy that the State Authority would impose mandatory conditions for the development of low-cost housing on developers who are desirous to undertake any property development ("low-cost policy"). This low-cost policy has therefore become a common feature in many large mixed development projects.

[8] The respondent, being the developer of the project in the present case, is not exempt from this same low-cost policy. It is not surprising that the Majlis Mesyuarat Kerajaan Negeri ("MMKN") on 6 December 2000 had agreed to approve the alienation of the tanah anugerah (covering 84 acres of land) to the respondent for the purposes of a mixed development with the strict condition that the mixed development must fulfil the purpose of relocating and housing squatters (setinggan) by constructing low-cost housing, medium low-cost housing, and medium-cost housing within the same tanah anugerah and the project.

[9] It is abundantly clear that the State's decision to alienate the tanah anugerah is also to discharge its social responsibility to provide affordable housing for the displaced and registered squatters within its jurisdiction. The commercial portion of the project was intertwined with the State's objective of discharging the State's social responsibility to provide affordable housing to its constituents.

[10] We must highlight that the context of low-cost policy underlying the very alienation of the tanah anugerah to the respondent is noticeably absent in the learned judge's grounds of judgment. The low-cost policy was briefly alluded to in the context of the exemption granted by the LPHS. This context is crucial as it would necessarily dictate the nature of disbursements which can be considered to be within the ordinary course of business (which the respondent can insist to be 'expenses' wholly and exclusively to generate income) or, on the other hand, the nature of disbursements that goes beyond expenses and thereafter transcends into the realm of capital or capital outlay.

[11] In a mixed development, which is encumbered with a low-cost policy, it is to be expected that a portion of the development would inevitably yield lower or poorer profit margins. This is commonly expected of low-cost housing as the purpose of low-cost housing is less centred on profiteering and more focused on providing affordable housing to the less fortunate. Thus, to cause anything (or an exemption) that would alleviate the respondent's burden imposed by this policy can already be seen to be expenses which are 'out of the ordinary' to the core business of developing low-cost housing. Thus, an upfront sum paid to allow the respondent to construct free market housing (to yield greater profits than the ordinary business of low-cost housing) is clearly not an ordinary business expense to enable the core business of low-cost housing.

[12] As mentioned earlier, it is an entirely difficult exercise to differentiate between capital payment and expenses if the courts were to only look at the final utility or effect of the payment. Of course, mathematically speaking, any monies injected, either capital or expenses, would somehow trickle down to revenue and finally profits (if any). Thus, the more meaningful and helpful exercise is to subjectively examine the purpose or object of the disbursement and not merely examining the nett effect of that disbursement.

[13] Now, despite undertaking the project with the low-cost policy in place, it was clear that the respondent had never intended to undertake the normal course of development for a low-cost housing project. From the get go, well before construction or even planning, the respondent had intended to steer the concept of the business away from having to build any low-cost housing.

[14] This intentional diversion and flouting of the low-cost policy was apparent ever since the respondent's planning and subdivision of the tanah anugerah. For reasons only known to the respondent, it apportioned a specific area within the 84 acres of tanah anugerah, which is situated on a class 3 slope area, for low-cost housing. Clearly, this class 3 slope area was not suitable for the construction of low-cost housing. It goes without saying that any development on a class 3 slope area would incur more expenses and further hurt the profit margin. To our minds, the respondent as a developer must have known that the development of low-cost housing in the class 3 slope area would not be economically feasible.

[15] Notwithstanding that the predicament of the respondent was self-induced, the respondent still submitted the development plan while apportioning the class 3 slope area to be the designated area for low-cost housing. Lo and behold, the respondent then applied for an exemption under Pekeliling PTGS Bil. 3/2007 to exempt itself from having to abide by the low-cost policy, citing the supposed economic non-feasibility of building low-cost housing on a class 3 slope area (a non-feasibility that was engineered by the respondent in the first place).

[16] In our judgment, the respondent could have (but intentionally have not) simply apportioned any other part of the 84 acres of tanah anugerah which was more suitable for low-cost housing. It was impossible for the respondent not to have known of the topography of the class 3 slope area within the 84 acres of tanah anugerah at the time the development plan was prepared. This is because it is common practice that the intended project land would have to be visited, studied, and surveyed before the development plan can be concluded. It would be beyond belief and illogical that the respondent did not have full knowledge of the lay-out of the land before drawing its development plan.

[17] Thus, despite having full knowledge of the class 3 slope area, the respondent still proceeded to apportion the very same class 3 slope area for low-cost housing. A thoroughly perplexing financial decision unless the respondent had always intended to inject capital outlay to divert the business away from any element of low-cost housing. The respondent did not even bother to re-plan or re-apportion the 84 acres tanah anugerah and just straight away applied for exemption to be allowed to construct free market housing.

[18] To be exempted, the respondent had to pay RM42,000 x 250 units of low-cost housing (which totals up to RM10,500,000). The State Authority then reduced the amount to RM8,750,000 (being RM35,000 x 250 units of low-cost housing). Upon paying the exemption sum, the respondent thereafter enjoyed the benefit of the exemption, the benefit to construct free market housing, and the benefit of higher profit margins of free market housing as compared to the margins of low-cost housing.

[19] Based on the foregoing, the respondent in our view, had wrongfully claimed the exemption sum as a deductible under s. 33(1) of the ITA 1967. The same wrongful deduction which had led the DGIR to issue out the notice of additional assessment for the year 2007, notices of assessment for YOAs 2008 and 2010, and notification of non-chargeability for YOA 2009.

The Decision Of The Special Commissioners Of Income Tax

[20] The respondent filed appeals *vide* Form Q to the Special Commissioners of Income Tax ("SCIT") against the DGIR's notices. The issues that were determined before the SCIT were as follows:

(i) first issue: whether the payment of the exemption sum made by the respondent to the LPHS to exempt itself from building low-cost housing in the project was deductible under s. 33(1) of the ITA;

(ii) second issue: whether the DGIR was time-barred under s. 91(3) of the ITA to issue out the notice of additional assessment for the year 2007, notices of assessment for YOAs 2008 and 2010, and notification of non-chargeability for YOA 2009; and

(iii) third issue: whether the appellant-DGIR has correctly and reasonably imposed a penalty under s. 113(2) of the ITA at the rate of 45% on the assessments and additional assessments for YOAs 2007, 2008, and 2010.

The SCIT's Decision Upon The Respondent's Appeals

[21] Upon the first issue, the SCIT found that the exemption sum ought not to be considered a deductible under s. 33(1) of the ITA 1967 primarily because:

(i) the respondent was the progenitor of the project's own non-feasibility to develop low-cost housing as it was by the respondent's own volition and planning to apportion the class 3 slope areas of the 84 acres of tanah anugerah for the construction of low-cost housing;

> *Jadi siapakah yang mencadangkan bahagian tanah untuk dijadikan kawasan pembangunan perumahan kos rendah? Dalam hal ini, kami berpandangan Perayu sendiri yang telah mencadangkan bahagian tanah yang berbukit dan cerun serta berbatu besar untuk dibangunkan dengan perumahan kos rendah. Kerajaan Negeri hanya meluluskan pecah bahagi tanah berdasarkan pelan pecah bahagi tanah yang dikemukakan oleh Perayu dan pihak berkuasa tempatan hanya meluluskan kebenaran merancang berdasarkan pelan tanah yang telah disediakan oleh Perayu.*
>
> ...
>
> *Kami juga merasa hairan dengan pemilihan bahagian tanah untuk dijadikan kawasan pembangunan. Kenapa Perayu memilih kawasan bukit dan cerun serta berbatu besar untuk dijadikan kawasan pembinaan kos rendah, kos sederhana rendah dan kos sederhana yang akan melibatkan perbelanjaan tinggi dan sudah semestinya tidak sesuai dijadikan kawasan pembangunan tersebut.*
>
> *Adakah Perayu telah merancang dari awal lagi kawasan berbukit, cerun dan berbatu besar untuk dijadikan alasan bagi mendapatkan pengecualian? Walaupun perkara ini tidak menjadi asas kepada keputusan kami, ianya menjadi suatu persoalan. Berdasarkan pemilihan kawasan yang dibuat oleh Perayu sendiri semasa menyediakan pelan pecah bahagai tanah yang kami percaya telah berbincang dengan juru ukur tanah yang juga kami percaya telah melawat tanah dan meneliti pelan topografi tanah (yang menunjukkan keadaan muka bumi tanah) semasa menyediakan pelan pecah bahagi tanah dan juga berpengetahuan mengenai peruntukan pengecualian pembangunan perumahan kos rendah yang terkandung dalam Pekeliling PTGS Bil. 3/2007?*
>
> (emphasis added)

(ii) the exemption sought was not a necessity to remove a business impediment. Construction and development can still continue had the respondent either re-plan or re-apportion the tanah anugerah or continued with a poorer margin (due to the respondent's own decision to designate the class 3 slope area as low-cost housing area);

Kami berpandangan sekiranya Perayu meneruskan pembangunan perumahan kos rendah, perumahan kos sederhana rendah dan perumahan kos sederhana dengan memindahkan kawasan pembangunan ke bahagian lain tanah yang masih kosong, Perayu tidak perlu membuat bayaran sumbangan pengecualian tersebut.

Perayu juga boleh memindahkan atau menukarkan kawasan pembangunan perumahan dan bebas menetapkan jenis dan harganya ke kawasan tanah perumahan kos rendah, perumahan kos sederhana rendah dan perumahan kos sederhana dan sebaliknya tetapi ini tidak dilakukan oleh Perayu walaupun boleh berbuat demikian.

(emphasis added)

(iii) the exemption sought was beyond the ordinary expense of the project which was already attached and expected to have a low-cost housing element. The exemption by nature was not a necessary expense to conduct business or development, but instead a one-time capital sum paid to pivot the business to be more advantageous (by having to construct free market housing instead of low-cost housing);

Perayu memilih untuk membuat bayaran sumbangan pengecualian tersebut dan kami berpandangan Perayu telahpun beroleh imbuhan atau pulangan apabila membangunkan perumahan yang lebih mahal daripada perumahan kos rendah yang jauh lebih murah. Harga jualan rumah yang dibangunkan sepatutnya sudah pun mengambilkira kos pembangunan tanah dan juga bayaran sumbangan pengecualian tersebut.

Perayu telahpun memperolehi balasan yang menjadi tujuan bayaran sumbangan pengecualian tersebut dibuat, mendapat pengecualian dan boleh membina perumahan harga bebas dan akhirnya memperolehi keuntungan daripada harga rumah yang jauh lebih tinggi dari perumahan kos rendah.

(emphasis added)

(iv) the exemption sought would cause the project to veer away from the originally intended business and purpose of the alienation of the tanah anugerah to the respondent (that is to fulfil the State's social responsibility to provide affordable housing for the less fortunate, as well as the displaced and registered squatters within the State's jurisdiction);

Kami berpandangan bahawa Perayu sebagai pemaju perumahan yang menerima tanah anugerah dari Kerajaan Negeri bagi tujuan penempatan setinggan, Perayu telahpun disyaratkan dan dikehendakai menyediakan perumahan kos rendah bagi mereka. Perayu yang merupakan penerima tanah anugerah sememangnya dan seharusnya memenuhi syarat-syarat yang telah dikenakan oleh Kerajaan Negeri, yang merupakan pemilik asal tanah kerajaan.

Jelas bagi kami bahawa pembinaan perumahan kos rendah adalah suatu kehendak yang perlu dipenuhi oleh Perayu dan ini diperakui oleh Perayu dalam penhujahan bertulis mereka sendiri.

(emphasis added)

[22] Upon the second issue, the SCIT found that the time limitation under s. 91(1) of the ITA 1967 does not apply because the respondent was negligent in declaring its appropriate and true income for assessment:

(i) the respondent was firstly negligent in that it had wrongly and negligently declared the exemption sum as a deductible in which the exemption sum should not have been considered a deductible from the get go:

> *Berdasarkan keputusan kami di atas untuk isu kedua, kami mendapati telah berlaku kecuaian di pihak Perayu apabila membuat tuntutan perbelanjaan bayaran sumbangan pengecualian kepada Kerajaan Negeri yang tidak sepatutnya dituntut dan dipotong di bawah subseksyen 33(1) ACP.*
>
> (emphasis added)

(ii) in addition to the negligent and wrong declaration of the exemption sum as deductible, the respondent by its own express admission had admitted that the respondent had wrongly and negligently claimed non-deductibles, *inter alia*, 'road and drainage', kos bayaran setinggan, kos tanah (proprietor's entitlement), costs for 'feasibility study' and costs for quit rent and assessment rent which clearly should not have been claimed as deductibles:

> *Perayu juga telah membuat beberapa tuntutan perbelanjaan lain seperti komisyen dan elaun staf, kos cukai pintu dan cukai tanah yang tidak sepatutnya dibuat dan dipotong yang hanya didapati setelah pasukan audit Responden menjalankan audit ke atas Perayu. Perayu kemudiannya telah bersetuju dengan dapatan audit Responden (kecuali bayaran sumbangan pengecualian pembangunan perumahan kos rendah).*
>
> *Kami mendapati Perayu telah membuat pengakuan melalui surat dan e-mel perhubungan dan juga pertemuan/perbincangan dengan Responden bahawa pengiraan cukai bagi Tahun Taksiran 2007, 2008, 2009, 2010 dan 2011 adalah tidak betul dan Perayu bersetuju supaya beberapa jumlah perbelanjaan tertentu ditambah balik ke dalam pengiraan cukai mereka. Kami merujuk kepada keterangan RW1, surat dapatan audit Responden di muka surat 39-63 Eksibit D, semua surat dan e-mel perhubungan anatara Perayu dengan Responden terutama yang di muka surat 11-14, 15-27, 28-35, 36, 37, 38 Eksibit D.*
>
> *Dalam Rayuan ini, Perayu telah tidak merayu untuk perbelanjaan lain tersebut dan hanya merayu untuk bayaran sumbangan pengecualian pembangunan perumahan kos rendah yang kemudiannya kami putuskan tidak boleh dituntut dan dipotong oleh Perayu sepertimana keputusan kami di atas. Jelas ini menunjukkan Perayu telahpun bersetuju dengan perbelanjaan lain yang ditimbulkan dalam dapatan audit Responden.*
>
> (emphasis added)

[23] Upon the third issue, the SCIT found that the imposition of the 45% penalty upon the assessment and additional assessment was appropriate under s. 113(2) of the ITA 1967:

> *Kita semua patut bersyukur dan berterima kasih kepada Responden kerana hasil dari audit yang dijalankan oleh pegawai Responden, tuntutan yang tidak dibenarkan dituntut dan dipotong tersebut telah dapat ditemui. Tindakan murni Responden ini dapat mengembalikan hasil cukai kepada negara.*
>
> *Oleh itu, kami memutuskan bagi Isu Ketiga ini bahawa Responden telah secara betul dan munasabahnya mengenakan penalti di bawah subseksyen 113(2) ACP pada kadar 45% atas taksiran dan taksiran tambahan yang dibangkitkan bagi Tahun Taksiran 2007, 2008 dan 2010. Pengenaan penalti sebanyak 45% tersebut boleh dijadikan tauladan kepada Perayu dan pembayar cukai lain supaya tidak mengulangi dan membuat perkara yang sama.*
>
> (emphasis added)

The Decision Of The High Court

[24] Dissatisfied with the SCIT's decision, the respondent appealed against the SCIT's decision at the High Court. The learned judge had allowed the appeal on the primary ground that the exemption was a bare necessity to remove an 'obstacle' that would have otherwise obstructed the respondent from conducting its business.

Our Analysis And Findings

First Issue: Whether The Payment Of The Exemption Sum Made By The Respondent To The LPHS To Exempt Itself From Building Low-Cost Housing In The Project Was Deductible Under Section 33(1) Of The ITA 1967

[25] From the outset, we must highlight that a vast majority of the context underlying the project was entirely absent and unappreciated in the learned judge's decision. The learned judge merely took a simplistic approach in that any sum paid (notwithstanding context, purpose, and object of the disbursement) must be considered a deductible expense if that disbursement had the effect of aiding the business to earn higher and more lucrative profit. A simplistic approach which we believe would make the differentiation between capital and ordinary business expense to be both impossible and meaningless (as no for-profit business would expend any sum of money be it capital or otherwise, for any purpose without the view of making a profit for the business).

[26] We find that the learned judge had wrongly asked only the objective question as to the nett effect of the disbursement and had failed to ask the proper subjective question as to the nature and purpose of the disbursement in and of itself. If we were to subscribe to the learned judge's objective approach to the issue, then any monies expended of whatever nature and purpose, can be considered deductible business expenses (consequence of

which we are certain would be wrong and be against the very spirit of the Income Tax Act 1967). We find guidance as to the appropriate subjective question to ask in Waller J's *ratio decidendi* in the House of Lords' decision in *Robinson (Inspector Of Taxes) v. Scott Bader Co Ltd* [1981] 2 All ER 1116:

> It is very difficult but perhaps not impossible, to determine this without *some element of subjectivity*. Indeed, in many cases the test will be wholly subjective. When deciding whether or not a solicitor is entertaining a client to lunch, *the test must be wholly subjective*. The solicitor is entertaining; it may be because it is an old client; it may be because it is the only opportunity to discuss the business. *The court has to decide the real purpose, if it is for the trade, vocation or profession, and whether it is independent, ie, independent of the business purposes to be served* (see *Bentleys, Stokes and Lowless v. Beeson (Inspector of Taxes)* [1952] 2 All ER 82 at 85-86, 33 Tax Cas 491 at 504-505). It would be impossible in such a case to do other than make the decision subjectively. In considering the purposes of a company there may be room for some objectivity, *but it will normally be to assist in making the subjective decision*.
>
> (i) *the test is a subjective, not an objective one – ie*, the relevant question is, *"What was the object of the person making the disbursement in making it?", not, "What was the effect of the disbursement when made*?".
>
> (emphasis added)

[27] We find that the learned judge had failed to appreciate that it was not that the respondent was 'unable' to abide by the low-cost policy in place, but instead the respondent deliberately flouted and had never intended to abide by the low-cost policy from the outset. The learned judge's misappreciation of fact is reflected in para. [14] of her grounds of judgment:

> [14] It is unchallenged fact that the proposed site for the appellant to build the low-cost houses was situated on a class 3 slope which according to the appellant has resulted to building the lower costs units not profitable as it involves a higher cost. In its letter to LPHS dated 19.9.2006, the appellant had explained that when earthwork began at the housing project, it was discovered that many large rock formations occurred in Phases 1 and 2 where the costs of breaking the rocks took a sharp rise in costs which puts a greater strain on profit and development of the project. The appellant had to make a choice of either having to halt the project or obtain the exemption. The appellant being unable to satisfy the condition imposed on the planning permission and in order to carry on with the project, opted to obtain an exemption.

[28] The learned judge also wrongly held that the exemption sought was an 'ordinary expense' which was in the ordinary course of the respondent's business of property construction and development. In para. [16] of her grounds of judgment, the learned judge held:

> [16] There is a need to take a holistic approach in the appellant's business in its entirety and the purpose of the payment/contribution. The housing project is how the appellant would derive its income. By making the

payment/contribution, the appellant has the option to build other types of unit that can produce more money and yield greater profit. The payment/contribution are part and parcel of the expenditure that the appellant has to incur in producing its income from the project. The appellant either had to build the lower cost units or make the payments to LPHS. It is clear that the payment was carry on with its main activity *ie*, selling houses. It can be comprehended that for commercial and business reason, the appellant to conduct its business on a more profitable basis as making the payment/contribution is or profitable to the appellant than building the lower cost units. An expenditure is not disqualified from deduction because the expenditure involves the attainment of profit.

[29] We find that the learned judge had failed to appreciate the finer nuances and technical nature of property development involving low-cost housing. The learned judge failed to appreciate that to be exempted from the low-cost policy is in fact the extraordinary feature in the project's development. An ordinary development and developer being placed with the low-cost policy would have to ordinarily abide by the same policy, and ordinarily expect a lower profit margin (as the very nature of low-cost housing is for affordability and not maximum profit). To expend money to be exempted from this ordinary course of business is no longer mere business expense, but a capital outlay to set the business.

[30] We agree with the appellant's argument that the exemption sought was a one-off capital payment or injection to pivot the respondent's business to be more advantageous, well beyond the ordinary nature and expectation of a mixed development with low-cost housing elements. We have mentioned above that the appropriate question to ponder is a subjective question. As to the appropriate subjective question to ask, we duly found guidance in Waller J's finding that the appropriate examination is Not On The Effect Of The Payment, but on the purpose of the payment (see *Scott Bader* (*supra*)). An extension to that wisdom is in Clyde LP's *ratio decidendi* in the case of *Robert Addie And Sons' Collieries, Limited v. The Commissioners Of Inland Revenue* 8 TC 671:

> What is "money wholly and exclusively laid out for the purposes of the trade" is a question which *must be determined upon the principles of ordinary commercial trading*. It is necessary accordingly to attend to the true nature of the expenditure, and to ask one's self the question, *is it a part of the Company's working expenses?* – is it expenditure laid out as part of the process of profit earning? – *or, on the other hand, is it a Capital Outlay? – is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all*? It was pointed out by Lord Davey in the case of *Strong v. Woodifield*[1], [1006] A.C. 448 at p. 453, and it has long been recognised, that in order to make deduction of a disbursement admissible "it is not enough that the disbursement is made in the course of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."
>
> (emphasis added)

[31] Thus, what can be considered or expected to be ordinary business expenses cannot merely be seen through the lens of loss or profit earning. It must be examined with full context of the nature of the business, and nature of the project in and of itself. If we were to follow the learned judge's objective examination, any monies spent into a business can be considered as deductible ordinary business expense (as it would have the nett effect of revenue and profits (if any)). This cannot be the intended position and precedent intended by the law or Parliament.

[32] Thus, it is incumbent upon the court to examine the nature, and full context of the project itself. Only then can the court viably and certainly identify what can be considered ordinary expense or otherwise in the context of that particular project. In the case before us, the very nature of the project was a mixed development with low-cost housing policy in place. Thus, it is ordinarily expected that a portion of the business would by design be less 'for-profit' and more for social responsibility. There would be an expected reduction in profit margin due to the low-cost policy in place as the respondent would not be able to construct and sell free market housing.

[33] Having the above ordinary expectations in mind, can the learned judge still surmise that the exemption was 'ordinary expense' in the context of a mixed development with low-cost housing element? We certainly do not believe so. The payment of the exemption sum was a one-off capital outlay to enable the respondent to altogether exempt itself from the social responsibility and low-cost housing elements ordinarily in place within the project. In the ordinary course of a mixed development with low-cost policy in place, ordinary expense would refer to expenses to realise the State's mission to aid and help its constituents to be able to afford housing. Any one-off payment that would exempt the respondent from this social responsibility element, is certainly not an ordinary expense and is instead a capital outlay.

[34] The learned judge had also misdirected herself in applying the wrong standard of determination between capital and business expense. In para. [20] of her grounds of judgment, she held as follows:

> [20] It is clear that in seeking for the exemption from the obligation imposed in building the lower costs houses, **the payment/contribution made by the appellant to LPHS was to remove the obligation or impediment to greater profit**. The courts have recognized that a payment made to remove an impediment or obstacle to profitable trading or that result in the increase of income is attributable to revenue.
>
> (emphasis added)

[35] The appropriate threshold for a disbursement to be business expense is that the object of the disbursement was so ordinary and necessary that it must be paid to remove an obstacle that otherwise would have obstructed the

business itself. But instead, the learned judge had wrongly widened the criteria to include disbursements to remove obstacles that would otherwise obstruct greater profit. An obstruction against business cannot at all be equated to obstruction against greater profit. The former (if not paid) obstructs business itself (a necessary business expense), while the latter (if not paid) merely obstructs bigger margins or an advantage (capital outlay).

[36] We refer to the House of Lords' decision in *Strong And Company Of Romsey, Limited v. Woodifield (Surveyor Of Taxes)* [1906] 5 TC 215 in which the House of Lords had dismissed an appeal against the tax commissioner's decision to disallow some deductible claimed by the taxpayer. The House of Lords in plain terms had described a deductible expense to be an expense that was so necessary to enable the business to Carry On and Earn profits and not to Enlarge the profit margin. It must be so crucial and essential to the business that without the expenses, the business would be Unable to conduct its trade. In dealing with the question of whether a sum of £1,490 paid by the appellants for cost and damages occasioned to a person staying in their inn by the fall of a chimney, is a proper deduction in arriving at the profits of the appellants' trade for the purpose of the Income Tax, Lord Davey at p. 220 had answered the said question as follows:

> The answer to that question, in my opinion, depends on the answer to be given to another question, whether the deduction claimed was a disbursement or expense wholly and exclusively laid out and expended for the purpose of the appellants' trade within the meaning of Rule 1 applying to bot Cases 1 and 2 of Schedule D in Section 100 of the Income Tax Act, 1842 ... I prefer to decide the case upon Rule 1 ..., which applies to profits of trades and also to professions, employments, or vocations. I think that the payment of these damages was not money expended "for the purpose of the trade." These words are used in other rules, and appear to me to mean for the **purpose of Enabling a person to carry on and earn profits in the trade**. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade or is made out of the profits of the trade. It must be made **for the purpose of EARNING the profits"**
>
> (emphasis added)

[37] A good parallel can be drawn with the House of Lords decision in *Tucker (Inspector Of Taxes) Respondent v. Granada Motorway Services Ltd Appellants* [1979] 1 WLR 683. In *Granada Motorway* (*supra*), the Minister of Transport leased to the taxpayer a motorway service area for a term of 50 years for a variable rate of annual rent. This variable rate of rent was subject to the duty imposed on tobacco products sold on the taxpayer's premises. To secure a better advantage under the lease, the taxpayer applied for the business to be exempted from duty on tobacco sales. The exemption was granted on the condition that the taxpayer pays an exemption sum of

A £122,200. Upon payment of the exemption sum, the taxpayer enjoyed the enduring benefit of lower rent under the lease as the rate of rent was no longer inclusive of duty on tobacco sales.

[38] In view of these facts, the House of Lords clearly pronounced that the payment of the exemption sum (although having the nett effect of higher
B profit by lowering the annual revenue expenditure) still remains a capital expenditure or capital outlay because by nature, it was a one-off capital injection that was not a recurring expense in the business of the taxpayer. The House of Lords also found that the advantage gained was by itself an enduring benefit akin to an asset. At pp. 685 to 688, the House of Lords (as per Lord
C Wilberforce), *inter alia,* stated:

> … *that since the payment of £122,220 procured an improvement* of a fixed capital asset by *reducing the rent payable under a lease*, it had brought into existence an *advantage which endured for the benefit of the taxpayer's trade in the way that fixed capital endured*; that, although a result of the payment was a future
D reduction in revenue expenditure, the payment was made to improve or modify a fixed capital asset and, *as such, it was capital expenditure and not deductible in computing profits for corporation tax purposes*.
>
> For myself I cannot doubt where it lies: it is a case of *once for all expenditure on a capital asset designed to make it more advantageous*.
>
> (emphasis added)

E

[39] On the same score, the respondent in the case before us paid the exemption sum to attain an enduring advantage to be wholly and fully exempted from the low-cost policy. Thus, by the same astute logic, the disbursement paid by the respondent (the exemption sum) cannot be
F considered an ordinary recurring business expense. It was a one-time payment to attain an advantage which pivots the business to be more lucrative (and not merely to enable business or trade).

[40] The learned judge had also wrongly found that the exemption from the low-cost policy had no enduring benefit. In para. [24] of her grounds of
G judgment, the learned judge states:

> [24] It must be emphasised that in obtaining the exemption, the appellant does not acquire any asset or advantage for the enduring benefit of its business. As stated earlier, a payment made to remove an impediment or obstacle to profitable trading does not create any new asset or enduring
H benefit and is attributable to revenue.

[41] In this regard, we are in agreement with the appellant that the one-off exemption would effectively carry an overwhelming enduring benefit in the form of a continuous extraordinary advantage for the business to be insulated and exempted from the ordinary social responsibility policies put in place
I typical to a mixed development with low-cost housing elements.

[42] On the contrary, as we have found earlier in our judgment, like the advantage of higher profit attained by the taxpayer *vide* being excluded from tobacco duty in *Granada Motorway* (*supra*), the respondent here similarly attained an enduring advantage in which the respondent would enjoy the extraordinary margin of free market housing (as compared to low-cost housing) even before the construction started, and shall continue to enjoy the fruits from the higher margins even beyond the conclusion of the project. Thus, it was plainly wrong for the learned judge to find that the respondent had not at all enjoyed any enduring benefits from the exemption.

[43] The learned judge also failed to appreciate the glaring distinction between an ordinary recurring business expense and a one-off or one-time capital outlay or injection to obtain an advantage beyond the ordinary expectation of the nature of business undertaken by the taxpayer. We find valuable guidance in the House of Lords' decision in the case of *British Insulated And Helsby Cables, Limited Appellants v. Atherton Respondent* [1926] AC 205.

[44] In *Atherton* (*supra*), the House of Lords dealt with a taxpayer's plea to declare a one-off lump sum payment to establish a pension fund (under a trust deed) for the taxpayer-company's staff to be a deductible 'ordinary business expense'. The House of Lords had held that such one-time payment to establish an advantage (in the form of the establishment of a pension fund for the staff) cannot be likened or compared to recurring monthly contributions for the same pension fund. Although technically, the lump sum payment might effectively contribute to the same pool of monies that the monthly contributions are paid, yet the purpose and nature of the one-time lump sum payment was not merely a contribution but the very establishment (or attainment) of an enduring benefit (asset) being the pension fund itself. Lord Atkins held as follows:

> If the word "asset" as used in this connection, be confined to something material – and I do not think it well can be so confined – then I am inclined to agree with Scrutton L.J., *that, if the existence of this pension fund results in making the staff of the company more contented and less inclined to change their service* and therefore, on the whole, more efficient, *these results when secured would amount to an "asset" of the company's business*. The Master of the Rolls expresses the same idea at the end of his judgment, in the following words(1): "It appears to me that *when you consider what is the nature of this payment*, not for the purpose of meeting an existing, an actual liability, but only for the purpose of, *in a very general way, improving the position of the staff, the right attribute to apply to this is that it was a payment made as and for the purpose of a capital outlay and cannot be deducted from the revenue* as payment made in the course of seeking profits and gains.
>
> (emphasis added)

[45] The same principle can squarely apply in the case before us. The nature of the one-off exemption sum was not to meet any existing liability or necessity but instead was to obtain an advantage (by improving the terms and policies placed upon the project) which in essence is an enduring asset. Viscount Cave LC concurred and shared the same sentiment in his *ratio decidendi*:

> But **when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage** for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for **treating such an expenditure as properly attributable not to revenue but to capital**. For this view there is already considerable authority.
>
> (emphasis added)

[46] Our deliberation above would be more than sufficient to reveal the unfortunate errors in the learned judge's decision. Nonetheless, it would be remiss of us if we do not address the respondent's utter reliance on a very recent decision of the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri Malaysia v. Mitraland Kota Damansara Sdn Bhd* [2023] 6 CLJ 701; [2023] 4 MLJ 846.

[47] Now, the respondent desperately tried to draw a parallel between the case before us and *Mitraland* (*supra*) on the stance that both of these two cases dealt with the payment of an exemption sum which had allowed a developer from being inundated with State policies upon their respective developments. In *Mitraland*, the developer paid an exemption sum to be exempted from the State policy providing for the reservation of units and discounted price for Bumiputera ("Bumi") buyers ("Bumi quota policy"). Meanwhile, the respondent in the case before us paid the exemption sum to be exempted from the State's low-cost policy.

[48] Perhaps, on a simplistic and at the surface level, the exemptions in the two cases might seem similar in nature. But in reality, and in full breadth of the facts and the law, the two cases are dissimilar and thoroughly distinguishable from one another. For us to explain the utter dissimilarity of *Mitraland* (*supra*) and the case before us, we must first properly understand the core reasons why the Court of Appeal had allowed the exemption sum paid in *Mitraland* to be declared as a deductible ordinary expense of the business. We must emphasise here that the Court of Appeal in *Mitraland* had arrived at its findings based on the following core reasons:

(i) the exemption from the Bumi quota policy was indeed a removal of an obstacle which otherwise would have obstructed the sale of the Bumi reserved units itself. In the ordinary course of property development, it is within ordinary expectation that there would be a risk that there might not be enough Bumi purchasers who would buy out the reserved Bumi

units. Thus, if not for the exemption, the developer in *Mitraland* (*supra*) would not be able to conduct business and sell off their stock-in-trade (being the unsold reserved Bumi units):

> If that sum was not paid, the former Bumiputera-reserved units could not be transferred or released to non-Bumiputera buyers. A payment made to remove an obstacle to profitable trading was attributable to revenue. The payment of the said sum was wholly and exclusively related to the production of income and was not capital in nature – they did not enrich or improve any item of fixed capital

(ii) the exemption sought was not a matter of choice but instead a matter of contingency in the ordinary case where the reserved Bumi units were not bought out by the Bumiputeras. It was not that the developer was intentionally or voluntarily seeking to flout or transgress against the Bumi quota policy;

> In fact it is common ground that without making the payment to LPHS the bumiputera units cannot be transferred or released to the non-Bumiputera purchasers. And it cannot be disputed that without the payments being made, the respondent would not have been able to sell the bumiputera units to the non-Bumiputera purchasers and generate its income. By selling the bumiputera lots to non-Bumiputera purchasers it directly generates the respondent's income as a property developer.

(iii) the exemption sought was an ordinarily expected expense in the context of the reality of the sale of the reserved Bumi units. It is ordinary in the course of such business dealing with the Bumi quota policy, that there would be a foreseeable and reasonable risk that the Bumis might not buy out the reserved Bumi units. In such instance, it is ordinary that a developer would seek to be exempted from the Bumi quota policy so as to allow the reserved Bumi units to be sold off to non-Bumis;

(iv) the exemption from the Bumi quota policy does not lead the developer to attain any 'advantage' or earn 'higher profits' beyond the ordinary margins and ability to sell the same reserved Bumi units. This is simply because, the revenue to sell the reserved Bumi units without Bumi discount will have to be tapered off with the same rate of discount (which the developer must pay to LPHS as the exemption sum):

> In the event the approval is granted, then an amount equivalent to the Bumiputera discount of 7% or 10%, as the case may be, has to be paid or refunded to LPHS for each such sale of a bumiputera unit to a non-Bumiputera. Hence, on a sale of a residential unit priced at RM500,000, the developer would have to pay the sum of RM500 to LPHS (equivalent to 10% Bumiputera discount). Thus, the income from such sale would be RM450,000, which is the same as the after discount income from the sale of a similar unit to a bumiputera

> purchaser. Thus, contrary to the findings of the SCIT, there is no gain in terms of the net realised sales proceeds to the respondent from the sale of the bumiputera units to non-Bumiputera purchasers after the LPHS approval is obtained. Thus we find that the following findings of the SCIT are plainly wrong.
>
> ...
>
> The respondent will not make any additional profit through the sale of the these bumiputera units to non-Bumiputera purchasers as the respondent has to pay/refund the amount equivalent to the Bumiputera discount to LPHS. The SCIT's finding is untenable. The respondent will not make further profit through the reduction of taxable income after deducting these expenses as the respondent declares the full non-Bumiputera purchase price stated in the invoice or the sale and purchase agreement as the turnover, and not the discounted bumiputera purchase price. As such, by deducting the 10% Bumiputera discount paid/refunded to LPHS as a revenue expense the respondent is merely reducing its taxable income to reflect its true income from that sale.

[49] Having understood the full breadth of the Court of Appeal's reasoning in *Mitraland* (*supra*), the dissonance and dissimilarity between *Mitraland* and the case before us becomes exceedingly glaring. Firstly, contrary to *Mitraland*, the exemption sought by the respondent in the case before us was entirely voluntary, pre-empted, and planned even before the project had an approved development plan. The exemption in *Mitraland* was brought upon by sheer unavoidable contingency totally beyond the developer's control. Starkly different, the respondent here had all the opportunity to re-plan and re-apportion the 84 acres tanah anugerah but had intentionally refused to do so in the blatant intent to seek to be exempted from the low-cost policy.

[50] Secondly, the exemption sought in *Mitraland* was beckoned upon a necessity at the back end of the development when the reserved Bumi units were already completed but were not able to be sold to Bumi buyers. By contrast, the exemption sought here was a pre-empted capital outlay planned even before the business (construction) was set in motion at the front end of the development.

[51] Thirdly, the exemption sought in *Mitraland* was indeed an ordinary expense ordinarily recurring in the course of developing a project placed with the Bumi quota policy. In the ordinary course of business in *Mitraland*, it is reasonably expected that Bumiputera buyers might not buy out the reserved Bumi units. Thus, it is ordinary that such a exemption becomes necessary to enable the units to be sold to non-Bumis. Notwithstanding, it is in fact ordinary that the State can impose conditions upon developers and it is also ordinary that developments shall abide by State-imposed conditions. It is out

of the ordinary course of business that a developer be simply allowed to voluntarily flout the conditions out of their own choice and volition before construction ever begins at the planning stage.

[52] In the ordinary course of low-cost housing development, it is reasonably expected that the profit margin would be a modest margin. To obtain an exemption to be exempted from this modest margin and to generate far more income than the original purpose and design of the affordable housing simply cannot be considered an 'ordinary expense'.

[53] Fourthly, the nett effect of the exemption in *Mitraland* was wholly different than the nett effect of the low-cost policy exemption in the case before us. In *Mitraland*, the exemption paid would only cause the nett revenue from the sale of the same property to non-Bumis to be the same as a sale to a Bumi buyer (with Bumi discount). Thus, the developer in *Mitraland* does not earn any additional income or profit from the sale of the reserved Bumi units to non-Bumi buyers.

[54] On the contrary, in the case before us, when the exemption sum was paid, the respondent was free to construct and sell free-market housing which were vastly more lucrative than low-cost housing. It was a total shift of concept, profit margin, and total elimination of all low-cost housing and social responsibility elements from the project.

[55] Fifth, in *Mitraland*, the exemption was not exactly a one-off capital payment. It was recurring costs expended as and when the contingency arises when the developer had to sell the unsold reserved Bumi units to non-Bumiputera purchasers. It is not a one-off capital injection to enable the developer to work outside the confines of the Bumiputera quota policy.

[56] The question is – beyond the slippery slope of discerning between a capital and an expense, we have to answer a simple subjective question: could the respondent still conduct its business in construction if not for the exemption? And the clear answer to that question is a resounding 'yes'. The respondent can still continue with the construction and sale of the mixed development by apportioning a different land area within the 84 acres of tanah anugerah for affordable housing. Thus, the exemption was not a necessary expense to earn income. Construction and sale can still proceed without the exemption *albeit* for lower margins (due to the construction of affordable housing ("affordable housing margin")). And this lower margin would be the common and ordinary margin for any developer who must abide by the policy for affordable housing.

[57] Anything that was injected to insulate the respondent from the affordable housing margin is not an ordinary expense and instead, a one-off capital injection to maximise profits at the detriment and expense of the low-

cost policy in place. It was not a commonly recurring expense that the respondent had to incur in the course of constructing and completing the mixed development project with low-cost housing element.

[58] We have deliberated on the first issue at long length above, and we do not hesitate to answer the first issue in the negative. The learned judge had erred in finding that the exemption sum paid by the respondent to exempt itself from building low-cost housing was deductible under s. 33(1) of the ITA 1967. The exemption sum was clearly a capital outlay injected to set the respondent's business in a more advantageous position beyond the ordinary terms and course of a mixed development with low-cost policy in place.

Second Issue: Whether The DGIR Was Time Barred Under Section 91(3) Of The ITA 1967 To Issue Out The Notice Of Additional Assessment For The Year 2007, Notices Of Assessment For YOAs 2008 And 2010, And Notification Of Non-chargeability For YOA 2009

[59] Considering our answer to the first issue, it follows that the respondent's argument (regarding the time bar issue) would necessarily fail as *Mitraland* (*supra*) does not in any way aid to prove the respondent's reasonableness in its conduct (in negligently claiming the exemption sum as a deductible expense).

[60] The respondent's contention on the time bar issue was two-folds, namely:

(i) it was not negligent and was reasonable for the respondent to believe that the exemption sum paid (to exempt itself from the low-cost policy) was a deductible expense considering the Court of Appeal's decision in *Mitraland* (*supra*); and

(ii) the assessment must necessarily match the negligence complained of for the time bar exception under s. 91(3) of the ITA 1967 to apply. Thus, the appellant cannot claim the exception on the basis of a different issue other than the exemption sum itself.

[61] Thus, by the respondent's own logic, then the respondent had unreasonably and negligently drawn a parallel between the exemption sum in this case before us and the Bumi quota exemption in the case of *Mitraland* (*supra*). To our apprehension, a reasonable man of sound mind would not have come to such an ill-conceived notion.

[62] A reasonable man would have understood the vast differences between an exemption by sheer necessity in the ordinary course of business (alike in *Mitraland*) and an exemption by outright voluntariness beyond and outside the ordinary course of business (alike in the case before us). A reasonable man would have been able to differentiate between an optional exemption

at the front end of the business (as capital outlay to set the business) and an exemption by contingency at the back end of the business (as a necessary expense to enable the very sale of stock-in-trade). A reasonable man would have been able to mathematically deduce that the exemption in *Mitraland* would not have earned the developer anything extra or additional beyond the ordinary course of a development with Bumi quota policy in place, and that the exemption in this case before us would grant the developer a greater advantage of an enduring benefit, and additional profits beyond the ordinary course of a mixed development with low-cost housing element. It was clear that the respondent had negligently deducted the exemption sum from its taxable income.

[63] Therefore, by the respondent's own argument, the negligence complained of would have already matched the DGIR's assessments and additional assessment over the wrongly deducted exemption sum. By the respondent's argument, then the exception under s. 91(3) of the ITA 1967 would necessarily apply. Thus, the DGIR was not time barred to issue its notices for assessments, additional assessments, and non-chargeability regarding the wrongly deducted exemption sum.

[64] The issue of whether or not the assessment in question must match the negligence complained of is already moot, considering that the nature of negligence in the case before us is already in alignment with the assessments (and additional assessment) which the DGIR was imposing against the respondent. Thus, we will not unnecessarily protract our decision longer beyond the issues that would already sufficiently determine this appeal.

[65] Likewise, we answer the second issue in the Negative. The learned judge had erred in finding that DGIR was time barred under s. 91(3) of the ITA 1967 to issue out the notice of additional assessment for the year 2007, notices of assessment for YOAs 2008 and 2010, and notification of non-chargeability for YOA 2009.

Third Issue: Whether The Appellant-DGIR Has Correctly And Reasonably Imposed A Penalty Under Section 113(2) Of The ITA 1967 At The Rate Of 45% On The Assessments And Additional Assessments For YOAs 2007, 2008, And 2010

[66] Under s. 113(2) of the ITA 1967, the DGIR has the discretion to impose a penalty up to the amount of the undercharged or undeclared income. However, in this case before us, the DGIR already exercised good grace and discretion and only imposed a penalty of 45% of the undercharged or undeclared income.

[67] The respondent contended a defence of good faith in that no penalty ought to be imposed as the respondent (although wrongfully claiming the exemption as deductibles) had mistakenly claimed such deduction in good faith. On the contrary, the appellant contended that the defence of good faith

is not open to a penalty imposed under s. 113(2) of the ITA 1967. We are inclined to agree with the appellant. If the same defence of good faith was intended by the Parliament to apply to s. 113(2) of the ITA 1967, then the Parliament would not have drafted two separate provisions to differentiate the circumstances in ss. 113(1) and 113(2) of the ITA 1967. The defence of good faith is a clear feature in s. 113(1) of the ITA 1967 (in instances where there was a criminal prosecution for omitting or understating income):

> 113. (1) Any person who:
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,
>
> shall, *unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged* in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.
>
> (emphasis added)

[68] On the other hand, the entire feature and phrase of 'good faith' had been clearly and expressly omitted in the penalty imposed under s. 113(2) of the ITA 1976:

> (2) Where a person:
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,
>
> **then, If No Prosecution Under Subsection (1) Has Been Instituted in respect of the incorrect return or incorrect information**, the Director General may require that person to pay a penalty Equal To The Amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).
>
> (emphasis added)

[69] Thus, it is apparent in the case before us that the respondent had already had the benefit of not having any criminal prosecution mounted against the respondent. A criminal prosecution would have opened the respondent to the risk of a penalty to the extent of double the amount of the undercharged or understated income. But in the case before us, the appellant already exercised due discretion and opted only to seek for a smaller sum of penalty (without pursuing any criminal prosecution) under s. 113(2) of the ITA 1967.

[70] For this proposition, we find support in the Court of Appeal decision in *Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 10 CLJ 114; [2017] 2 MLJ 120:

> There is a clear distinction between sub-s. 113(1) and sub-s. 113(2). Although paras 113(1)(a) and (b) and paras 113(2)(a) and (b) are almost identical, but the effect of sub-s. 113(1) is different from sub-s. 113(2). Sub-section 113(1) provides for an offence being committed in the circumstance provided for in para (a) or (b) unless that person 'satisfies the court that the incorrect return or incorrect information was made or given in food faith'. *Whereas sub-s. 113(2) provides for a situation where there is no prosecution under sub-s. 113(1) has been instituted* in the circumstances provided for in para 113(2)(a) or (b), the Director General may require that person to pay a penalty. *That being the case, the defence of 'good faith' as found in sub-s. 113(1), and not found in sub-s. 113(2), does not apply to the Director General's discretion under sub-s. 113(2)*. We therefore disagree with the appellant's submission on this score.
>
> (emphasis added)

[71] In the event we are wrong in this issue, we have difficulty, in any case, finding good faith on the part of the respondent based on the respondent's conduct. It must be kept strictly in mind that the respondent would have evaded a tremendous amount of tax if not for the appellant's proactivity and initiative to examine the respondent's wrongful and understated taxable income. The case of *Mitraland* was not even in existence to lend any support to the respondent's 'good faith' at the time the exemption sum was claimed to be a deductible. In fact, the exemption sum was only one out of numerous other matters which the respondent had already admitted to be wrongfully claimed as deductibles. If there was truly any genuine good faith in the respondent's conduct, the respondent could have written in to the DGIR or at least communicated with the DGIR to seek clarification as to the DGIR's stance regarding the exemption sum. Instead, the respondent although 'in doubt' had proceeded to 'gamble' the matter and outright claimed the exemption sum as a deductible (in hopes that the gamble would play out in the respondent's favour).

[72] We are of the opinion that 'good faith' must involve the element of honesty and earnest pursuit of the truth notwithstanding the risk that the 'truth' of the matter might be unsavoury or unfavourable to one's case. There must be an innocent contemplation of all the facts and prudence to act in manners that will reflect good conscience and *bona fide* intent. We find guidance in the Federal Court's decision in *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711 in which the Federal Court had defined the term 'good faith' in broad legal terms:

> What does the term mean? '**Good faith**' is a weighty phrase. It implies, according to *Concise Oxford English Dictionary* (11th Ed) honesty or sincerity of intention. According to the authors of *NS Bindra's Interpretation of Statutes* (10th Ed) p 1636, 'good faith' includes due inquiry and implies not only an upright mental attitude, and clear conscience of a person, **but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable person**. According to the authors, 'good faith' contemplates **an honest effort to ascertain the facts upon which exercise of the power must rest**; it must, therefore, be summed up as 'an honest determination from ascertained facts'. The authors stated that 'good faith' precludes pretence or deceit, and also negligence and recklessness. The authors further said although the phrase may vary in the context of different statutes, subjects and situations, honest intent free from taint or fraud, or fraudulent design, is a constant element of its connotation.
>
> (emphasis added)

[73] With the Federal Court's summation above in mind, we were unable to find evidence of the respondent's effort to, at the very least, communicate with the appellant regarding the position of the exemption sum (in the context of taxable income) for some semblance of certainty. The respondent contended that it had obtained professional advice in managing its tax affairs. Yet, the respondent remained unable to explain the reason the respondent had not written to the appellant for clarification if there was an honest doubt as to the taxability of the exemption sum. At best, the supposed attainment of professional advice can only be seen as measures for the respondent to take a 'calculated risk' on the tax deductibility of the exemption sum. In any case, it would certainly fall short from an honest and straightforward enquiry communicated to the appellant itself.

[74] As we have already mentioned, the case of *Mitraland* has not yet been decided for the respondent to rely on to hold an 'innocent belief' that the exemption sum was deductible. In fact, even if *Mitraland* was already decided at that time, a reasonable man would have been able to identify the plain and obvious differences between the two exemptions (as we have explained at length in our *ratio decidendi* in determining the first issue).

[75] All of the above considered in this part, we accordingly answer the third issue in the positive. We agree that the appellant-DGIR had correctly and reasonably imposed a penalty under s. 113(2) of the ITA 1967 at the rate of 45% on the assessments and additional assessments for YOAs 2007, 2008, and 2010.

Our Decision

[76] All of the above considered, we hereby allow the appellant's appeal. The learned judge's order and decision are hereby set aside. The decision of the SCIT is hereby affirmed and reinstated. We also order costs of RM25,000 (here and below) to be paid by the respondent to the appellant.